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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JACOB LOUIS NELSON COLLINS, Defendant and Appellant.	H046089 (Santa Cruz County Super. Ct. No. 16CR04301)

In March 2016, appellant Jacob Louis Nelson Collins obtained an ATM card belonging to another person and used it to withdraw $650 from an ATM machine without that person's permission. Based on this conduct, Collins was convicted of identity theft, in violation of Penal Code section 530.5, subdivision (a) (hereafter section 530.5(a)). After the trial court had terminated his probation, Collins sought redesignation of his felony offense as a misdemeanor pursuant to Proposition 47, which took effect in 2014, by filing a petition under section 1170.18. The trial court concluded that violations of section 530.5 are ineligible for relief under Proposition 47 and denied the petition.

As explained further below, because Collins committed his offense after Proposition 47's effective date, the "retrospective relief" provided by section 1170.18 is not available to him. We therefore affirm the trial court's order.

I. FACTS AND PROCEDURAL BACKGROUND

Collins was charged by information with identity theft (Pen. Code, § 530.5(a)[1]; count 1); forgery (§ 484e, subd. (d); count 2); misdemeanor receiving stolen property with a value not exceeding $950 (§ 496, subd. (a); count 3); identity theft (§ 530.5(a); count 4); and misdemeanor forgery (§ 470, subd. (d); count 5). On November 23, 2016, Collins pleaded no contest to count 1, felony identity theft, in violation of Penal Code section 530.5(a). Reciting the factual basis for the plea, the prosecutor stated, "on or about March 2nd, 2016, in the County of Santa Cruz, the defendant, along with some of his codefendants did obtain an ATM card of the victim . . . and attempted to use it to withdraw money from the ATM machine." The trial court observed, "[a]pparently successfully since there is $650 in restitution." The prosecutor stated, "[c]orrect." Defense counsel agreed with this factual basis. The record on appeal does not contain any other information about Collins's crime.

The parties waived preparation of a probation report, and the trial court sentenced Collins on the day of his change of plea, November 23, 2016. The trial court suspended imposition of sentence, placed Collins on 36 months of formal probation and ordered that he serve 180 days in the county jail, among other conditions of probation. The trial court ordered payment of restitution to the victim in the amount of $650 and dismissed counts 2, 3, 4, and 5. Collins did not appeal his conviction.

Approximately 18 months after he had been placed on probation, in May 2018 Collins filed a petition for resentencing pursuant to section 1170.18, subdivision (a) (hereafter section 1170.18(a)), which was calendared for a hearing on June 14, 2018 (Proposition 47 petition). In his petition, Collins stated that he was currently serving a sentence for a felony offense and was under the supervision of probation.

[1] Unspecified statutory references are to the Penal Code.

On June 14, 2018, Collins admitted a violation of the terms of his probation, and his probation was terminated as "unsuccessful." The minute order for the June 14 hearing states that Collins was in custody on another matter, and Collins was "[d]ischarged on this [c]ase." The minute order also indicates that "Defense Counsel's Motion to Resentence/Redesignate is continued by the Court. [¶] Redesignation Hearing set." The trial court set a future court date for "Prop[osition] 47 Redesignation Hearing."

The People filed an opposition to Collins's Proposition 47 petition. The People argued that section 530.5 is not subject to Proposition 47, but they did not contend either that Collins should have refiled his petition under section 1170.18, subdivision (f) (hereafter section 1170.18(f)) for redesignation of his conviction or should have requested that his previously filed petition be converted to an application for redesignation. The People also did not argue that Collins was barred from relief under Proposition 47 because he had committed his crime after the initiative went into effect.

On August 7, 2018, the trial court held a hearing on Collins's Proposition 47 petition. Neither defense counsel nor the prosecutor suggested that Collins was no longer entitled to relief under section 1170.18(a), that Collins should have requested the trial court to treat his petition as if it had been filed under section 1170.18(f), or that the date of commission of Collins's crime foreclosed Proposition 47 relief altogether.

After hearing argument from the parties, the trial court summarized the conflicting case law on the subject and said, "I believe that [*People v. Sanders* (2018) 22 Cal.App.5th 397] makes more sense than [*People v. Jimenez* (2018) 22 Cal.App.5th 1282]. And we'll see what the Supreme Court does with it. But my intent is to deny. [¶] If indeed the Supreme Court decides that they want to go in a different direction and truly broaden Proposition 47 to include 530.5s, then I'll deal with it at that point. But 530.5, from the Court's perspective is not included within Proposition 47." Although the trial court did not formally state on the record that Collins's petition was denied, the minute order for the hearing states "[m]otion is denied."

The trial court did not issue a written order denying Collins's Proposition 47 petition. In response to this court's inquiry about the record, the trial court augmented the record with an order signed on March 25, 2019, stating that on August 7, 2018, the trial court held a hearing on the "application to redesignate," and the trial court denied the application because the specified offense was "ineligible."

On August 10, 2018, Collins filed a notice of appeal stating he was appealing from the trial court's August 7, 2018 order or judgment. We appointed counsel to represent Collins in this court. Appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, which stated that the denial of the trial court's order on Collins's Proposition 47 petition "is the sole subject of this appeal." Appellate counsel described the case and the facts, particularly the procedural history of Collins's Proposition 47 petition, but raised no specific issues on appeal. We notified defendant of his right to submit a written argument on his own behalf, and he has not done so.

After independent review of the record, we requested supplemental briefing on whether the trial court erred in denying Collins's application to redesignate his conviction for a violation of a Penal Code section 530.5(a) from a felony to a misdemeanor pursuant to Proposition 47. Collins argues that the trial court erred in its conclusion that convictions of identity theft, in violation of section 530.5(a), are categorically barred from relief under Proposition 47. The Attorney General contends that Collins was not entitled to file an application for Proposition 47 redesignation because Collins was charged, convicted, and sentenced after Proposition 47 took effect. The Attorney General further maintains the trial court correctly concluded that section 530.5 is not subject to Proposition 47.

II. DISCUSSION

We first examine our jurisdiction. Collins timely appealed the trial court's order denying redesignation of his conviction pursuant to section 1170.18(f). The trial court's

order is appealable. (See *People v. Bear* (2018) 25 Cal.App.5th 490, 494–495 (*Bear*).) Therefore, we have jurisdiction over this appeal.[2]

We next examine whether Collins may seek relief under Proposition 47 for his crime, which was committed after November 5, 2014. "The applicable standard of review varies by issue. The order denying [the petitioner's] eligibility for Proposition 47 relief ' " ' is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.' " ' [Citation.] In addition, we must ' " ' view the record in the light most favorable to the trial court's ruling.' " ' [Citation.] Where we are called upon to address ' " 'the interpretation of a statute enacted as part of a voter initiative, the issue . . . is a legal one, which we review de novo.' " ' [Citation.] But '[w]here the trial court applies disputed facts to such a statute, we review the factual findings for substantial evidence and the application of those facts to the statute de novo.' " (*People v. Simms* (2018) 23 Cal.App.5th 987, 994.)

The Attorney General argues that Collins was barred from obtaining relief pursuant to his Proposition 47 petition, which Collins filed pursuant to section1170.18(a), because relief under that provision is limited to persons who "on November 5, 2014, [were] serving a sentence for a conviction." (§ 1170.18(a).) We agree that Collins, who was charged with a crime committed in 2016 and convicted that year, was not "on November 5, 2014, . . . serving a sentence for a conviction." Therefore, he was not entitled to file a petition under section 1170.18(a). (See *People v. DeHoyos* (2018) 4 Cal.5th 594, 604 (*DeHoyos*) ["It certainly is true . . . that section 1170.18, subdivision (a)'s reference to those defendants 'serving a sentence' for a covered offense operates to

[2] We recognize that this court may have had the authority to dismiss Collins's appeal pursuant to the principles announced in *People v. Serrano* (2012) 211 Cal.App.4th 496, 503. However, we found the procedural history of Collins's case sufficiently unclear to request further records from the trial court and additional briefing from the parties. Under those circumstances, we decline to dismiss the appeal as abandoned. (See *id*. at p. 504.)

distinguish them from other defendants who have already completed their sentences and are therefore entitled to relief under a separate provision. (§ 1170.18, subd. (f).)"].)

We do not find it dispositive that Collins originally filed his petition under section 1170.18(a). The trial court had the authority to deem Collins's petition, although originally filed under section1170.18(a), as an application for redesignation under section 1170.18(f) after his probation had been terminated. (See *Bear*, *supra*, 25 Cal.App.5th at p. 499.) Collins never formally asked to have his petition amended and the trial court never expressly granted Collins leave to amend, but defects in the record do not defeat our ability to address Collins's petition. "Proposition 47 . . . expressly states that it 'shall be broadly construed to accomplish its purposes' and 'shall be liberally construed to effectuate its purposes.' [¶] As to public policy, California courts have long adhered to the 'policy that cases should be tried on their merits rather than dismissed for technical defects in pleading.' " (*Id*. at p. 498.)

However, the Attorney General also asserts that Collins was not entitled to file an application for redesignation under section 1170.18(f) as he was charged, convicted, and sentenced after Proposition 47 took effect. Collins does not address this issue in his briefing. Collins assumes he is entitled to retrospective relief under Proposition 47 and asserts that the trial court erroneously concluded that Proposition 47 does not extend to violations of section 530.5(a).

We agree with Collins that the trial court's conclusion that convictions of section 530.5.(a) are ineligible for Proposition 47 relief was likely erroneous. Based on the reasoning of *People v. Gonzales* (2017) 2 Cal.5th 858, *People v. Page* (2017) 3 Cal.5th 1175, and *People v. Romanowski* (2017) 2 Cal.5th 903, a conviction for identity theft under section 530.5(a) is likely eligible for reduction under Proposition 47 if the crime qualifies as misdemeanor shoplifting under section 459.5(a) and the person is otherwise eligible for relief under Proposition 47. (See *People v. Brayton* (2018) 25 Cal.App.5th 734, 739, review granted October 10, 2018, S251122.) However, Collins has not

convinced us—indeed, he has not even asserted—that he is eligible for relief under Proposition 47 for a crime committed after the initiative took effect. We turn now to that question.

Proposition 47 took effect on November 5, 2014, and reclassified certain drug- and theft-related offenses as misdemeanors. (*DeHoyos, supra,* 4 Cal.5th at p. 597.) "Proposition 47 also includes two sets of detailed provisions setting out the terms under which *retrospective relief* is available to persons who were serving, or who had already completed, felony sentences for offenses now redefined as misdemeanors." (*Id*. at p. 598, italics added.)

Section 1170.18(a) provides: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." Subdivision (f) of section 1170.18 provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

Thus, "[s]eparate provisions articulate the conditions under which the new misdemeanor penalty provisions apply to completed sentences (Pen. Code, § 1170.18, subds. (f)–(j)) [and] sentences still being served (*id*., subds. (a)–(e))." (*DeHoyos*, supra, 4 Cal.5th at p. 601.) "The eligibility criterion for relief under [section 1170.18] subdivision (f) is the same as under subdivision (a): the defendant must be someone 'who would

have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense.' (§ 1170.18, subd. (f).)" (*Page*, *supra*, 3 Cal.5th at p. 1185.)

"Sentences yet to be imposed," on the other hand, are controlled by the substantive offenses as amended or added by the proposition. (*DeHoyos*, *supra*, 4 Cal.5th at p. 601, citing §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subd. (a), 496, subd. (a), 666, subd. (a); Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a)). These offenses are sometimes described as Proposition 47's "ameliorative provisions," and they "apply directly in trial and sentencing proceedings held after the measure's effective date." (*People v. Lara* (2019) 6 Cal.5th 1128, 1133–1135.)

Although we have found no published opinion directly addressing the question whether individuals who commit crimes after the entry into force of Proposition 47 are precluded from seeking relief under section 1170.18(f), at least one Court of Appeal has addressed this issue in the context of section 1170.18(a). (*People v. Gutierrez* (2018) 20 Cal.App.5th 847 (*Gutierrez*).)

In *Gutierrez*, the defendant had used a rental car without authorization in June 2015 (after Proposition 47 went into effect) and was charged with violating felony Vehicle Code section 10851, among other crimes. (*Gutierrez*, *supra*, 20 Cal.App.5th at pp. 849–850.) A jury convicted him of Vehicle Code section 10851, but the trial court had failed to instruct on the element that the car was worth more than $950, necessary for a post-Proposition 47 felony conviction. (*Gutierrez*, at pp. 849, 854–855, citing *Page*, *supra*, 3 Cal.5th at p. 1183.) On direct appeal, the defendant contended that he was entitled to resentencing under section 1170.18, subdivision (a), while the Attorney General argued that the claim was forfeited and that the defendant bore the burden of proving the value of the vehicle at trial. (*Gutierrez*, *supra*, at p. 855.)

The Court of Appeal observed, "The parties have mistakenly conflated the retrospective and prospective applications of Proposition 47. As discussed, Penal Code section 1170.18 allows individuals *who had already been convicted of felonies at the time*

of Proposition 47's enactment to petition for resentencing if the felony had been reclassified as a misdemeanor. When such a petition has been filed, the defendant bears the burden of proving he or she is eligible for *retrospective relief*. (*People v. Romanowski* (2017) 2 Cal.5th 903, 916.) However, Gutierrez had not even committed the crime charged at the time Proposition 47 went into effect. Thus, relief under Penal Code section 1170.18 is unavailable to him. The issue in this case is not whether Gutierrez should be resentenced under Penal Code section 1170.18, but whether he was properly convicted of a felony theft violation of Vehicle Code section 10851." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 855, italics added.)

It is undisputed that Collins committed his offense after the passage of Proposition 47. Collins's conviction is now final. (See Cal. Rules of Court, rule 8.308; *People v. Kemp* (1974) 10 Cal.3d 611, 614.) Section 1170.18, subdivision (n) states: "Resentencing pursuant to this section does not diminish or abrogate the finality of judgments in any case that does not come within the purview of this section." "[W]hen a final judgment in a case cannot be opened for resentencing under the procedures created by section 1170.18, the judgment remains final." (*People v. Buycks* (2018) 5 Cal.5th 857, 894.)

Based on the text of section 1170.18 and the Supreme Court's construction of its scope, we conclude that because Collins committed his offense after Proposition 47's effective date, the "retrospective relief" provided by section 1170.18 is not available to him. (*DeHoyos*, *supra*, 4 Cal.5th at p. 598.)

We recognize that no party in the trial court proceedings asserted that Collins was not entitled to relief under Proposition 47 because of the date of commission of his offense. The trial court therefore did not have the opportunity to consider the question. In addition, we are aware that the reach of Proposition 47 to crimes not included with the statutory list set out in section 1170.18(a) has been a matter of continuing uncertainty years after the voters approved the initiative. This delay can make it difficult for

defendants to timely argue that erstwhile felonies should be recharacterized as one of the ameliorative misdemeanors created by Proposition 47.

However, " 'a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion' " (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) Furthermore, reaching the merits of Collins's arguments notwithstanding our conclusion that section 1170.18(f) does not extend to his case "would ill serve 'the importance of finality of judgments [citation], and the interest of the state in the prompt implementation of its laws.' " (*In re Martinez* (2009) 46 Cal.4th 945, 966–967.) Although we understand Collins's arguments on the merits, the statutory text of section 1170.18 forecloses the relief he seeks through an application or petition filed under sections 1170.18(a) or 1170.18(f).

III. DISPOSITION

The order denying Collins's Proposition 47 petition is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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BAMATTRE-MANOUKIAN, J.

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